

BOARD OF APPEALS
Jesse Geller, Chairman
Jonathan Book
Christopher Hussey

Town of Brookline

Massachusetts

Town Hall, 1st Floor
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Brookline, MA 02445-6899
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Patrick J. Ward, Clerk

TOWN OF BROOKLINE
BOARD OF APPEALS
CASE NO. 2015-0022
PASCAL & IRINA AGUIRRE

Petitioners, Pascal and Irina Aguirre, applied to the Building Commissioner for permission to construct a new parking space at the basement level and construct a 184 s.f. rear addition. The application was denied and an appeal was taken to this Board.

The Board administratively determined that the properties affected were those shown on a schedule certified by the Board of Assessors of the Town of Brookline and fixed June 11, 2015 at 7:30 p.m. in the Selectmen's Hearing Room as the date, time and place of a hearing for the appeal. Notice of the hearing was mailed to the Petitioner, to their attorney of record, to the owners of the properties deemed by the Board to be affected as they appeared on the most recent local tax list, to the Planning Board and to all others required by law. Notice of the hearing was published on May 28, 2015 and June 4, 2015 in the Brookline Tab, a newspaper published in Brookline. A copy of said notice is as follows:

NOTICE OF HEARING

Pursuant to M.G.L., C. 40A, the Board of Appeals will conduct a public hearing at Town Hall, 333 Washington Street, Brookline, on a proposal at:

98 SPOONER RD – CONSTRUCT A NEW PARKING SPACE AT THE BASEMENT LEVEL, A 184 SQUARE FOOT REAR ADDITION, AND A SECOND STORY REAR DECK, in an S-10, Single-Family, residential district, on June 11, 2015, at 7:30 PM in the 6th Floor Selectmen's

**Hearing Room (Petitioner: AGUIRE PASCAL & IRINA; Owner: AGUIRE PASCAL & IRINA)
Precinct 12**

The Board of Appeals will consider variances and/or special permits from the following sections of the Zoning By-Law:

- 1. Section 5.20: Floor Area Ratio**
- 2. Section 5.43: Exceptions to Yard and Setback Regulations**
- 3. Section 5.70: Rear Yard Setback Requirements**
- 7. Section 8.02.2: Alteration or Extension**

Hearings may be continued by the Chair to a date/time certain, with no further notice to abutters or in the TAB. Questions about hearing schedules may be directed to the Planning and Community Development Department at 617-730-2130, or by checking the Town meeting calendar at: www.brooklinema.gov.

*The Town of Brookline does not discriminate on the basis of disability in admission to, access to, or operations of its programs, services or activities. Individuals who need auxiliary aids for effective communication in Town programs and services may make their needs known to **Robert Sneirson, Town of Brookline, 11 Pierce Street, Brookline, MA 02445. Telephone: (617) 730-2328; TDD (617)-730-2327; or email at rsneirson@brooklinema.gov.***

Jesse Geller, Chair

Christopher Hussey

Jonathan Book

At the time and place specified in the notice, this Board held a public hearing. Present at the hearing was Chairman Mark G. Zuroff and Board Members Christopher Hussey and Avi Liss. The case was presented by the attorney for the Petitioner, Robert L. Allen, Jr., Law Office of Robert L. Allen, Jr. LLP, 300 Washington Street, Second Floor, Brookline, Massachusetts 02445. Also in attendance were the Petitioners, Pascal and Irina Aguirre, and the Petitioners' architect, David Rubino, Huth Architects, 313 Washington Street, Suite 212, Newton, MA 02458.

Chairman Zuroff called the hearing to order at 7:45 p.m. Attorney Allen stated that the Petitioner proposes to construct a new parking space at the basement level, add a new deck above, and construct a 184 s.f. rear addition.

Attorney Allen presented to the Board a background of the Petitioners and the property, stating the following: the subject property is located within the Chestnut Hill North Local Historic District. Mr. Allen noted that the Preservation Commission approved the proposal following a lengthy public meeting process on April 15, 2015. He stated that the Petitioners purchased the single-family home in 2008 and have two children. At the time of purchase, the home included finished basement space and a small solarium above the rear garage. He stated that a special permit for floor area relief was granted for the solarium. Mr. Allen noted that due to poor construction and water damage, the rear deck, garage, and solarium are rotting and must be replaced and or repaired at a significant cost. He stated that the proposal will provide the Petitioners an opportunity to improve parking access, which is currently located at the bottom of a steep driveway with a 6 foot grade change, and a hairpin turn.

David Rubino, 313 Washington Street, Netwon, MA, described the project as a single-car garage slightly above the basement level with a series of yard terraces. He stated that the existing garage has completely deteriorated due to failing masonry. He noted that the small solarium directly above the garage and the uncovered deck are significantly damaged. Mr. Rubino stated that a new covered garage space will reduce the hard angle turn required for entry and that rather than create an oversized rear deck above the two garage spaces, the existing deck and solarium will be replaced by a 184 s.f. rear addition and a new uncovered deck above the proposed garage space. He stated that the additional floor area will serve to expand the family room.

Chairman Zuroff and Board Member Christopher Hussey questioned the net change in floor area and requested certified square footage calculations. Mr. Rubino stated that the net increase in floor area is 100 square feet because the solarium will be removed. He further noted that the proposed garage parking is not included in the gross floor area calculations and confirmed that these calculations were

certified by a registered architect, and will be stamped and re-submitted prior to the issuance of a building permit.

Zoning Board Member Avi Liss questioned if a rear dormer is accurately reflected in floor area calculations. Mr. Rubino confirmed that the rear dormer is pre-existing and included in the existing and proposed FAR calculations. Chairman Zuroff questioned if abutters are in support of the proposal. Ms. Aguirre confirmed that all three immediate abutters submitted letters of support for the proposal.

Mr. Allen stated that in 1994 the previous owners constructed a garage, deck, and an 84 s.f. solarium addition. He stated that at that time, the existing house was 3,051 s.f., which was in excess of the floor area maximum allowed on the 10,095 s.f. lot by approximately 22.5 s.f. Mr. Allen stated that the Board of Appeals granted relief for the addition, which increased the total floor area to 3,135 s.f. and required rear yard setback relief. He noted that at the time relief was granted, the basement was not finished.

Mr. Allen stated that the Petitioners request relief from **Section 5.20** of the Zoning By-Law to increase the total floor area by approximately 100 s.f. Mr. Allen accounted for the difference in floor area by showing that the existing 84 s.f. solarium would be removed and a new addition totaling 184 s.f. constructed in its place. In addition, the Petitioners seek rear yard setback relief pursuant to **Section 5.70** of the Zoning By-Law, which requires 30 feet and the existing and proposed site is setback only 23.7 feet.

Attorney Allen discussed special permit relief under **Section 9.05** of the Zoning By-Law, arguing: (1) the specific site is an appropriate location where the Preservation Commission approved the plans, and the garage/addition are located entirely in the rear yard; (2) there will be no adverse effect on the neighborhood where they have received letters of support from the owners of 233 Middlesex Road, 92 Spooner Road, and 106 Spooner Road; (3) no nuisance or serious hazard to vehicles or pedestrians

will be created where the proposal does not depart from the existing parking scheme and will create a safer environment for the homeowners; (4) adequate and appropriate facilities will be provided for the proper operation and proposed use; and (5) development will not have a significant adverse effect on the supply on housing available for low and moderate income people.

In addition, Mr. Allen discussed front and side yard setback relief pursuant to Section 5.43 of the Zoning By-Law. Mr. Allen stated that the Petitioner has not yet developed a landscaping plan, but plans to screen the addition with plantings on the outskirts of the deck.

Attorney Allen explained that the project is essentially a 100 square foot addition that will result in a gross floor area that is 148% of what is allowed in the S-10 (Single-Family) Zoning District. He stated that the basement conversion, completed prior to current ownership, impacts the Petitioners' request for relief. Mr. Allen stated that the Petitioners' proposal would be allowed by special permit prior to the basement conversion, but now requires variance relief even though the total floor area remains below the allowed 150%. He stated that in his opinion, the phasing of floor area increases exposes an anomaly in the Zoning By-Law.

Attorney Allen stated that the statutory requirements for a variance can be met due to the structural uniqueness and topography of the lot, but noted that a finding pursuant to Mass. General Law, Chapter 40a, Section 6 is more appropriate in this instance because the floor area represents a pre-existing non-conformity. Mr. Allen stated that under M.G.L. c. 40A, Section 6, a pre-existing non-conforming single or two-family home can be expanded or altered if the proposal is found not to be substantially more detrimental to the neighborhood, and if no additional non-conformities are created. According to the Massachusetts Appeals Court in Deadrick v. Zoning Board of Appeals of Chatham, there is a difference between reconstruction that increases existing non-conformities and one that creates new non-conformities. 85 Mass. App. Ct. 539, 546-547 (2014). Mr. Allen noted that construction that

increases existing non-conformities may be authorized by a special permit and a M.G.L. c. 40A, Section 6 finding, while construction that creates new non-conformities requires a variance.

Mr. Allen stated that both the floor area ratio and side-yard setback non-conformities are pre-existing and will comply with special permit standards in accordance with Sections 5.43 and 9.05 of the Zoning By-Law. Furthermore, the Petitioners' proposal will not be substantially more detrimental to the neighborhood

Chairman Zuroff noted that a M.G.L. c. 40A, Section 6 evaluation may be appropriate in this instance and referenced Deadrick v. Zoning Board of Appeals of Chatham (2014), which established that an existing non-conformity may be expanded if no new non-conformities are created. Mr. Zuroff stated concern that preexisting non-conforming single-family homes in Brookline may be enlarged in a manner that is inconsistent with the surrounding neighborhood through a Section 6 finding. He further stated that the Town of Brookline should address the need for a consistent evaluation that will limit large-scale floor area increases that would otherwise require a variance.

Attorney Allen commented that the language in M.G.L. c. 40A, Section 6 dictates that the expanded non-conformity cannot be significantly more detrimental to the neighborhood. Mr. Zuroff acknowledged this language, but noted that the subjective nature of that language allows for successful arguments on either side of that definition. Mr. Allen noted that, in this instance, the floor area increase is miniscule and appropriate, there is no impact on the existing streetscape and any potentially impacted abutters have expressed support, including the immediate right, left, and rear yard abutters. Mr. Allen stated that this particular proposal represents critical home repair that meets the standards of Section 9.05 of the Zoning By-Law and M.G.L. c. 40A, Section 6.

Board Member Hussey suggested that topography should be included on all submitted site plans if a variance discussion may occur in order to more accurately consider lot conditions.

Zoning Board of Appeals Chairman Zuroff asked if there was anyone present who wished to speak in favor of this application. No one spoke in favor of the application.

Zoning Board of Appeals Chairman Zuroff asked if there was anyone present who wished to speak in opposition to the application. No one spoke in opposition to the application.

Jay Rosa, Zoning Coordinator for the Town of Brookline, delivered the findings of the Planning Board and the Building Department:

FINDINGS:

1. **Table 5.20 – Floor Area Ratio**

| | <u>Allowed By Right</u> | <u>Allowed by Special Permit</u> | <u>Existing</u> | <u>Proposed</u> | <u>Finding</u> |
|--|-----------------------------|--|-----------------|-----------------|-----------------|
| Floor Area Ratio (F.A.R.) | 0.30 (100%) | 0.36 (120%) | 0.31 (104%) | 0.33 (110%) | <u>Variance</u> |
| Floor Area (s.f.) | 3,028 | 3,634 | 3,135 | 3,322 | |

2. **Section 5.70 – Rear Yard Requirements**

| Dimensional Requirements | Required/Allowed | Existing | Proposed | Relief |
|-------------------------------------|-------------------------|-----------------|-----------------|--------------------|
| Rear Yard Setback | 30 feet | 23.7 feet | 23.7 feet | Special Permit* |

* Under **Section 5.43**, the Board of Appeals may waive yard and setback requirements if a counterbalancing amenity is provided.

3. **Section 5.43 – Exceptions to Yard and Setback Regulations**

4. **Section 8.02.2 – Alteration or Extension** □ A special permit is required to alter this non-conforming structure.

Mr. Rosa stated that the Planning Board expressed unanimous support for the rear addition and new garage parking space. He stated that the Planning Board members felt that the massing was consistent with the neighborhood and adequately screened from abutting neighbors. Mr. Rosa stated that

the proposed alterations will remove open air parking and replace the existing solarium with an addition that is more in line with the design of the home. He noted that abutters have expressed support and the Preservation Commission approved the proposed alterations. He stated that the Planning Board deferred to the ZBA in terms of evaluating the FAR variance request. Therefore, should the Board of Appeals find that the statutory requirements for a variance have been met, the Planning Board recommends approval of the plans, by David Rubino of Huth Architects, dated October 9, 2014 and January 23, 2015, and the site plan by George C. Collins of Boston Survey Inc. dated August 4, 2014, subject to the following conditions:

1. Prior to the issuance of a Building Permit, the applicant shall submit to the Assistant Director for Regulatory Planning for review and approval (a) site plan, stamped and signed by a registered land surveyor, including setbacks, open space, parking area layout, retaining walls; and (b) floor plans and elevations.
2. Prior to the issuance of a Building Permit, a landscaping plan shall be submitted subject to the review and approval of the Assistant Director for Regulatory Planning.
3. Prior to the issuance of a building permit, the applicant shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals decision: 1) a final site plan stamped and signed by a registered engineer or land surveyor; 2) final floor plans and elevations stamped and signed by a registered architect; 3) Certificate of Appropriateness from the Preservation Commission; and 4) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Mr. Rosa next delivered the findings of Michael Yanovitch, Interim Chief Building Inspector. He stated that the Building Department had no objection to the requested relief, but cautioned the Board to determine the most appropriate zoning relief mechanism. He stated that the Zoning By-Law section numbers have changed since 1994 but essentially the property received 5.22.3.b.1.b relief for an exterior addition (solarium) under 120% of allowed gross floor area, which precluded the property from receiving future relief under 5.22.3.c to go up to 150% with an exterior addition. Furthermore, he stated that the basement was subsequently converted to livable space, so any flexibility to work within the

original 120% is also not available. Mr. Rosa stated that this leaves the Board with the variance evaluation. Mr. Rosa noted that the pre-existing non-conforming status is unclear because the current floor area relief was granted by special permit, thus making it conforming or a permitted non-conformity, and the basement conversion could be considered as a self-inflicted non-conformity.

Attorney Allen responded stating that both the FAR and side-yard setback non-conformity existed prior to any granted special permit relief. Additionally, the Building Department cannot confirm when the basement conversion occurred because there is no permit history for the construction work. He stated that Section 6 was enacted to protect single and multi-family homes that existed prior to current zoning regulations. For these reasons, Mr. Allen believed that a Section 6 evaluation was more appropriate than a variance evaluation.

In deliberation, Board Member Liss stated favor for the Section 6 finding. This Chapter 40A provision is clearly a tool to protect non-conforming properties. He stated that the Board must be clear on why a Section 6 finding is appropriate, specifically the pre-existing non-conforming status and the neighborhood impact evaluation. This is an appropriate tool in this instance but there is a potential to misuse this provision, particularly for larger impact projects.

Chairman Zuroff agreed that the proposal is a fairly modest project and believed that it did qualify for the Section 6 finding. He noted that a lot's uniqueness and hardship argument could be made, but that is unnecessary if the Board agrees on the Section 6 finding. Mr. Zuroff again referenced Deadrick v. Zoning Board of Appeals of Chatham (2014) as justification for this particular Section 6 finding and stated that each case that comes up in this regard must be carefully examined to avoid creating a precedent that opens the door to uncontrolled house expansion. Mr. Zuroff also stated that the standard for special permit relief (side-yard setback) is met in accordance with Sections 5.43 and 9.05 of the Zoning By-Law.

Board Member Hussey concurred with these comments and suggested that conditions be modified to include structural dimensions stamped and signed by a registered architect.

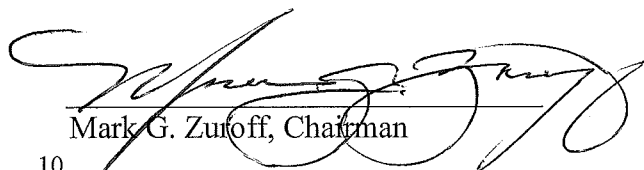
The Board then determined, by unanimous vote that the requirements for a special permit for Sections 5.20, 5.70, and Section 8.02.2 of the Zoning By-Law pursuant to Section 5.43 of the Zoning By-Law were met. The Board made the following specific findings pursuant to said Section 9.05:

- a. The specific site is an appropriate location for such a use, structure, or condition.
- b. The use as developed will not adversely affect the neighborhood.
- c. There will be no nuisance or serious hazard to vehicles or pedestrians.
- d. Adequate and appropriate facilities will be provided for the proper operation of the proposed use.
- e. Development will not have any effect on the supply of housing available for low and moderate-income people.

Accordingly, the Board voted unanimously to grant the requested relief subject to the following conditions:

1. Prior to the issuance of a Building Permit, the applicant shall submit to the Assistant Director for Regulatory Planning for review and approval (a) site plan, stamped and signed by a registered land surveyor, including setbacks, open space, parking area layout, retaining walls; and (b) floor plans and elevations, including all structural dimensions and gross floor area calculations.
2. Prior to the issuance of a Building Permit, a landscaping plan shall be submitted subject to the review and approval of the Assistant Director for Regulatory Planning.
3. Prior to the issuance of a building permit, the applicant shall submit to the Building Commissioner for review and approval for conformance to the Board of Appeals decision: 1) a final site plan stamped and signed by a registered engineer or land surveyor; 2) final floor plans and elevations stamped and signed by a registered architect; 3) Certificate of Appropriateness from the Preservation Commission; and 4) evidence that the Board of Appeals decision has been recorded at the Registry of Deeds.

Unanimous Decision of
The Board of Appeals

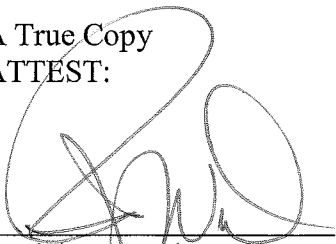

Mark G. Zulloff, Chairman

Filing Date: 7/21/15

RECEIVED
TOWN OF BROOKLINE
TOWN CLERK

2015 JUL 21 A 10:39

A True Copy
ATTEST:

A handwritten signature in dark ink, appearing to read 'Patrick J. Ward', is written over a horizontal line.

Patrick J. Ward
Clerk, Board of Appeals